



# PACIFIC LEGAL FOUNDATION

August 2, 2012

Chairperson Dan Richards and Board Members  
Mr. Jeff Morales, Chief Executive Officer  
California High-Speed Rail Authority  
770 L Street, Suite 800  
Sacramento, CA 95814

**VIA FACSIMILE (916) 322-0827  
AND FIRST-CLASS MAIL**

Re: The inclusion of a 10% DBE goal into the  
California High-Speed Rail Authority's S/DBE Program

Dear Chairperson Richards, Board Members and Mr. Morales:

On behalf of the Pacific Legal Foundation and its members, I am submitting these comments in response to the proposed amendment to the Small and Disadvantaged Business Enterprise (DBE) Program Plan, which would include a 10% DBE utilization goal. The California High-Speed Rail Authority's (Authority) adoption of any DBE utilization goal at this time, even if it is to be achieved through race-neutral measures, would undoubtedly violate the federal DBE regulations and Article I, Section 31, of the California Constitution.

## **I. THE AUTHORITY'S ADOPTION OF A 10% DBE UTILIZATION GOAL WOULD VIOLATE EXISTING FEDERAL REGULATIONS**

According to your July 25, 2012 memorandum to Authority Board Members regarding the "Amendment to the Small and Disadvantaged Business Enterprise Program Plan," the suggested 10% goal is based entirely on "proposed Congressional language" in Senate Bill 1813, which has not been passed by the House of Representatives.<sup>1</sup> That language proposes to amend the federal regulations by making the national aspirational DBE goal of 10% applicable to projects administered by the Federal Railroad Administration (FRA).

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<sup>1</sup> The status of the bill can be found here: <http://www.govtrack.us/congress/bills/112/s1813/text>.

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The Authority's proposed 10% DBE goal is based entirely on the assumption that a national 10% goal may be adopted by all federal aid recipients as their overall DBE goal. However, existing federal DBE regulations specifically prohibit the very action the Authority is contemplating. Federal aid recipients "cannot simply rely on either the 10 percent national goal, [a] previous overall goal or past DBE participation rates . . . without reference to the relative availability of DBEs in [the local] market." 49 C.F.R. § 26.45(b).

The FRA requires the Authority to incorporate the best practices of 49 C.F.R. Part 26. But those regulations state the following:

Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination.

49 C.F.R. § 26.45(b). As the Authority's August 2, 2012 agenda materials demonstrate, the Authority has never completed a disparity study. It therefore lacks "demonstrable evidence" of DBE availability.

Your July 25, 2012 memorandum's reference to 49 C.F.R. § 26.41 is potentially misleading, because it omits the prohibitory subsections which should be brought to the attention of the Authority Board Members. The "10 percent goal is an aspirational goal at the national level" to be used by the United States Department of Transportation (USDOT) "as a tool in evaluating and monitoring DBEs' opportunities to participate in [USDOT]-assisted contracts." 49 C.F.R. § 26.41(b). The regulations go on to warn:

The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

49 C.F.R. § 26.41(c). Federal-aid recipients may not avoid the goal setting procedures found in 49 C.F.R. § 26.45 by simply adopting the national 10% goal.

Rather than permitting the Authority to set an overall DBE goal of 10% at this time, the federal regulations specifically prohibit the Authority from doing so.

**II. THE AUTHORITY WOULD VIOLATE ARTICLE I,  
SECTION 31, OF THE CALIFORNIA CONSTITUTION BY  
ADOPTING A RACE- AND SEX-BASED GOAL AT THIS TIME**

The Authority has the duty to enforce Article I, Section 31, of the California Constitution (Section 31), which provides in pertinent part:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). Section 31 is similar to, but not synonymous with, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under Equal Protection Clause principles, state action that relies upon suspect classifications must be tested under strict scrutiny to determine whether there is a compelling governmental interest. But Section 31 has no compelling state interest exception. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 567 (2000). Instead, Section 31 “prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.”” *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 293 (2004) (quoting *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 42 (2001)).

The California Supreme Court, in applying Section 31 to a city’s contracting scheme, held: “Rather than classifying individuals by race or gender, [Section 31] prohibits the State from classifying individuals by race or gender.” *Hi-Voltage*, 24 Cal. 4th at 561 (citation omitted). A state program that encourages prime contractors to prefer subcontractors by race or sex violates Section 31. *Id.* at 563. Just as Section 31 bans preferential treatment directly from state actors, the state is also forbidden from encouraging private actors to grant preferential treatment on the basis of race and sex. *Id.* at 573 (Mosk, J., concurring).

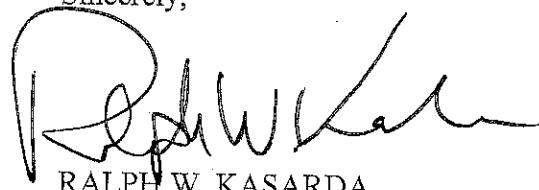
Article I, Section 31(e), authorizes race-based governmental action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State. The Authority may not rely on this exception to set a 10% DBE goal. Any “discrimination beyond that necessary to maintain federal funding is prohibited by section 31, subsection (a), and is not excepted from that prohibition by subdivision (e).” *C&C Constr.*, 122 Cal. App. 4th at 300. Because the federal regulations do not authorize the Authority to set goals based on race and sex at this time, the Authority is required to comply with state law. *C&C Constr.*, 122 Cal. App. 4th at 309.

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## CONCLUSION

The Authority's proposed adoption of a 10% overall DBE goal would violate not only the federal DBE regulations, but also the California Constitution. Rather than taking action that violates federal and state law, and invites unnecessary litigation, the Authority should reject the proposal to set an overall DBE goal at this time.

Sincerely,



RALPH W. KASARDA  
Staff Attorney

## On High Speed Rail and 5-County BART

### Danger and major costs plague "Blended" High Speed Rail (HSR) on Caltrain tracks:

#### Danger:

- Pedestrians and vehicles at 43 grade crossings;
- HSR trains inches from unprotected passengers on station platforms.

#### Major Cost Items:

- Tunneling in San Francisco;
- Terminal (e.g., yard, shop) facilities;
- Electrifying Caltrain for HSR;
- Future trans-Bay HSR tube.

#### HSR really needs secure (grade separated, fenced) trainway.

Better HSR Route: North from San Jose, follow the Mulford rail line - long used by Amtrak's Coast Daylight - to a joint BART/HSR station in West Oakland. (BART would run from there every few minutes to four stations in downtown San Francisco and many others in the West Bay, and frequently to East Bay BARTland stations.) Much safer, with none of the major cost items.

Caltrain: Millbrae-Santa Clara: convert 2-track UP-Caltrain to 3-track UP-BART. UP freight track all at grade. BART: about 5 miles in shallow box; balance at grade beside UP, with about 10 new overpasses. North of Millbrae: Convert to Muni airport express line.

#### Goal: Develop a balanced 5-County BART plan:

- BART around the Bay;
- Upgrade (multi-track, grade separate, fence) the Mulford rail line;
- Grade separate East Bay rail, Elmhurst to West Oakland;
- BART to the Golden Gate and Carquinez bridges;
- BART to Brentwood, Livermore, and beyond the Altamont;
- A joint HSR/BART station in West Oakland.

Let the voters decide, as they did for today's BART half a century ago.

Robert S. Allen  
BART Director (1974-1988)  
Retired SP (now UPRR) Western Division, Engineering/Operations

Kern Minority Contractors Association  
1330 E. Truxtun Ave  
Bakersfield, Ca. 93305  
PH # 661-324-7535  
Email: [kmca@att.net](mailto:kmca@att.net)

Date: August 2, 2012

CHSRA Board Members

Re: August 2, 2012 Board agenda items 2, 3, 4,6,7,8

**Public Comment**

My name is Marvin Dean, President of Kern Minority Contractors Association (KMCA)  
I am speaking today in behalf of myself and KMCA membership.

My written & oral comment is regarding the following agenda items:

Item 2

Caltrans Inter- Agency Agreement relocation HWY 99

- Request agreement with Caltrans include **CHSRA SB Program 30% contract goal**, if CHSRA will be funding the relocation work.

Item 3

SMP 10% DBE Goal

- We strong support their a 10% DBE project goal now  
So that black & other minority businesses have opportunities to be included in the project

Item 4

Environmental Justice Policy

- We believe more need to be done by CHSRA to assist residents & smaller and minority business along the project right away area have an opportunity to be include in the project construction job and contracting opportunities. This project will have impact to the environment justice communities. I believe their not adequate mitigation being done my CHSRA at this time.

Items 6 & 7

We support staff recommendation

Items 8

DBE Disparity Study

- We support CHSRA moving forward now with hiring firm for disparity study to determine the final DBE goal to be set that secure all minority have most opportunity possibly to be included in this project.

Thank you for opportunity to provide my comment

# MINORITY CONSTRUCTION

## NEWS BULLETIN

Kern Minority Contractors Association

And

*San Joaquin Valley Contractors Association*

In Partnership With

*San Joaquin Valley Construction Management Group, LLC*

Jointly working together to help get *local central valley smaller SB/DBE/DVBE/MB Firms & residents Ready and Able for 1<sup>st</sup> Phase of California High Speed Central Valley \$6 Billion Dollar Project, schedule to start construction January 2013*

In addition we are putting together experience SB/DBE/DVBE/MB TEAM  
For partnering together to assist California High Speed Rail Prime Contractor Design Build Team meet their require 30% project goal approx. \$2 Billion Dollar opportunities for SB/DBE/DVBE/MB

We are seeking sub contractors all construction trades & profession service providers  
For bidding High Speed Rail and other future public work project that require  
SB/DBE/DVBE/MB/MBE/WBE/SEC-3 Contracting goals.

**Our partnership will be providing the following support services:**

- > San Joaquin Valley Construction Academy – SB/DBE/DVBE/MB “Get Ready Boot Camp”
- > San Joaquin Valley Contractor One Stop Resource – SB/DBE/DVBE/MB & Prime Contractor
- > San Joaquin Valley Office Services - out of area firms & local that need public office use
- > Advocacy in behalf of our members & team to incease contracting opportunities
- > Project Construction Management Service to assist smaller firms 2<sup>nd</sup> & 3<sup>rd</sup> tier sub with need

Like to join us or get more information stop by our table or calls office @ 661-324-7535 or send email: [kmca@att.net](mailto:kmca@att.net) ask for Albert Prince or Marvin Dean

*Currently taking registration*

**6<sup>th</sup> Annual San Joaquin Valley Region Public Contracting Expo & Conference**

SBE/DBE/DVBE/UDBE/MBE/WBE/MB/HUB ZONE/SEC-3

Highlight Transportation / Energy / Central High Speed Rail & Other Public Work projects

Visit our event web site: [www.sjvannualpce.info](http://www.sjvannualpce.info)

If you have suggestion for speakers other topic to cover at conference like hear from you



SJVBCA

## **Contractors / Small Business Owners Public Contracting Boot Camp**

[www.sjvannualpce.info](http://www.sjvannualpce.info)

San Joaquin Valley  
SBE/DVBE/DBE/MBE/WBE  
Construction Academy

Date  
To Be Announced



## **Learn How to Bid & Win Public Contracts**

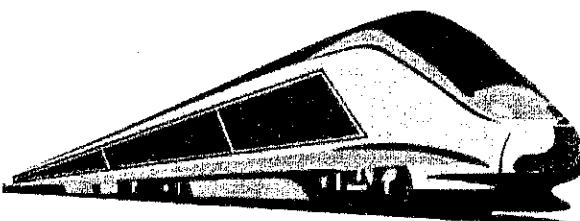
- Business Structure – DBA, LP, LLC, Corporation
- Business City / County License
- State Contractor License
- Insurances – Liability & Workers Compensation
- Bonding
- Bookkeeping – Invoicing, Accounting and Taxes
- Payroll Services
- Certification – DBE / DVBE / SBE / MBE / WBE / Sec 3
- Contracting – The Bidding Process
- Labor Compliance – Prevailing Wage
- Payment Progress
- Partnering on Construction Projects
- Technical Assistance Resources
- Safety and Emergency Disaster Plan (Family and Business)
- Business Owner / Basic Estate Planning
- DBE / SBE / MBE / WBE / Sec 3 Sub-Contractors Construction Management Service

SAN JOAQUIN VALLEY CONSTRUCTION ACADEMY  
SBE/ DBE / DVBE / MBE / WBE / WMBE / MICRO

To schedule a future workshop for your agency or company  
Call (661) 324-7535 ask for Marvin Dean

# REQUEST FOR SUB-BIDS

*Join us!*



CALIFORNIA HIGH-SPEED RAIL PARTNERS

**FLUOR<sup>®</sup> SKANSKA**



**HDR**

You're cordially invited to join us for three "Bidding Preparation Boot Camps" as part of the California High Speed Rail's Construction Package #1 of the Initial Construction Section!

**Who:**

All interested SB/DBE/DVBE/MB's who are interested in bidding to the California High Speed Rail Partners (Fluor/Skanska/PCL/HDR-Design/Build Team) for Construction Package #1

**What:**

Invite you to attend a series of Small Business Enterprise opportunity meetings featuring a 'Bid Preparation Boot Camp' which will provide you with specific steps you will need to take in order to prepare your firm's profile and qualifications to bid to the California High Speed Rail Partners. Opportunities in the areas of A&E, Professional Services, Goods, Materials, Equipment, General Services, Trucking, General/Specialty Construction Services and Specialty Contractors). A more comprehensive list will be posted to the website and handed out at the events.

Known as Construction Package 1 of the Initial Construction Section, the Project is located within the Counties of Madera and Fresno and the City of Fresno. The expected cost is between \$1.5 and \$2 billion. The Authority and California High Speed Rail Partners are committed to making small business a top priority in all contracting phases. The overall goal is to achieve 30% participation of small and disadvantaged business on the project.

We have scheduled three events to better serve you;

**Event #1**

**Monday, July 30, 2012 (Fresno/Clovis)**

8:00am	Registration/Networking
9:30am	'Bid Preparation Boot Camp' Program
10:30am	Meet the Decision Makers
12:00pm	Event Concludes
Location:	Clovis Veterans Memorial District Building 808 4th Street, Clovis, CA 93612
RSVP:	<a href="mailto:chrspartners@fluor.com">chrspartners@fluor.com</a>

# REQUEST FOR SUB-BIDS

**Event #2**

**Monday, August 6, 2012 (Santa Clarita/Valencia)**  
8:00am Registration/Networking  
9:30am 'Bid Preparation Boot Camp' Program  
10:30am Meet the Decision Makers  
12:00pm Event Concludes  
Location: Hyatt Regency Valencia  
24500 Town Center Drive, Valencia, CA 91355  
RSVP: chsrpartners@fluor.com

**Event #3**

**Monday, August 13, 2012 (Sacramento)**  
8:00am Registration/Networking  
9:30am 'Bid Preparation Boot Camp' Program  
10:30am Meet the Decision Makers  
12:00pm Event Concludes  
Location: Woodlake Hotel Sacramento  
500 Leisure Lane, Sacramento CA 95815  
RSVP: chsrpartners@fluor.com

**Travel Info:**

For Driving Directions, Public Transportation and Room Accommodations go to: [www.chsrpartners.com](http://www.chsrpartners.com)

**For More Info:**

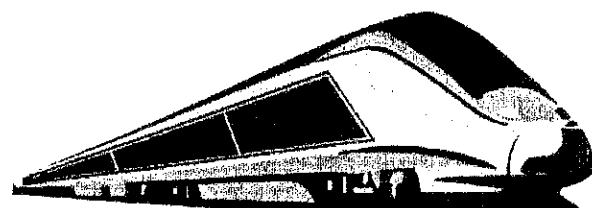
Go to: [www.chsrpartners.com](http://www.chsrpartners.com)  
or e-mail: chsrpartners@fluor.com

**Potential Contract Opportunity Categories:**

Architects, Engineers and Professional Services  
Goods, Materials, Equipment Suppliers  
General Service Providers  
Trucking and Hauling  
General and Special Construction Contractors  
Specialty Contractor

See website for a more comprehensive list of opportunities  
[www.chsrpartners.com](http://www.chsrpartners.com)

**We Look Forward to Seeing You Soon!**  
**[www.chsrpartners.com](http://www.chsrpartners.com)**



**CALIFORNIA HIGH-SPEED RAIL PARTNERS**

**San Joaquin Valley  
SBE/DVBE/DBE/MBE/WBE  
Construction Academy**

**Contractor Academy Summary:**

The San Joaquin Valley Construction Management Group, LLC (SJVMG), National Black Contractors Association (NBCA), San Joaquin Valley Black Contractors Association (SJCBCA), Kern Minority Contractors Association (KMCA) and others have entered into partnership to develop and operate the **San Joaquin Valley Construction Academy**. The program goal is to increase the number of companies that are able to successfully bid and complete public work projects; **High Speed Rail, Caltrans** and other local transportation improvement projects. The academy will assist Small Business (SBE) Disabled Veteran Business (DVBE) Disadvantage Business (DBE) Minority Business (MBE) Woman Business (WBE) to get **Ready & Able** to participate in the **procurement and sub contracting** opportunity with **High Speed Rail** central valley and other public work projects

**Background:**

Public work projects are complex and intimidating to smaller companies and that new to the public sector market. Most public agencies and prime contractors have problems locating & entering into contract with smaller minority, women and black owned businesses on their public work projects.

The San Joaquin Valley Construction Academy in partnering with public agencies and prime contractors industry association can help increase the number of SBE/DVBE/DBE/MBE/WBE participates on their projects. And increase diversity in the construction workforce; provide public work contracting opportunity especially in communities with high unemployment and underemployment though out the central valley

One of the main reasons the academy is being launched now, many of us in the SBE/DVBE/DBE/MBE/WBE community know first-hand the problems preventing these firms in the past from getting contract on project work projects. We believe that with one the largest public work projects in California history, the “**High Speed Rail,**” which plans to start construction in San Joaquin Valley sometime in September 2012; an effort needed to be underway now that help get these SBE/DVBE/DBE/MBE/WBE firms ready for this project and develop partnering relationship with prime contractors planning to bid this work.

This academy will help sub-contractors, prime contractors & HSR in meeting SBE/DVBE/DBE project goals and removing some road block that prevent these firms from doing business together. After you review this document have questions, please give us a call @ 661-747-1465 ask for Marvin Dean we can help you locate qualify SBE/DVBE/DBE Sub Contractors for your High Speed Rail projects bid.

Marvin Dean  
President  
(661) 747-1465

Albert Prince  
Plan Room Manager  
(661) 332-3216

KERN MINORITY  
CONTRACTORS  
ASSOCIATION

Bid Plan Room  
Member Services  
Resource Center

# MINORITY CONSTRUCTION



## California High-Speed Rail Authority

Monthly Meeting Agenda  
Thursday August 2, 2012

Sacramento City Hall  
915 I Street  
Sacramento, CA 95814

9:00 a.m.

## California High-Speed Rail Authority *Fresno – Bakersfield Project Update*

### Correction to Revised Draft EIR/Supplemental Draft EIS for Fresno to Bakersfield

In the preliminary Section 4(f)/6(f) evaluation, a potential resource was inadvertently reported to be within the “footprint” of disturbance for the BNSF Alternative through Bakersfield. In fact, this resource is located approximately 400 feet south of the BNSF Alternative, within the footprint of disturbance of the Bakersfield South Alternative. Because of the importance of the Section 4(f) determination, the preliminary 4(f)/6(f) evaluation contained in Chapter 4.0 of the Revised Draft EIR/Supplemental Draft EIS has been corrected to indicate that the affected potential resource in Bakersfield would be impacted by the Bakersfield South Alternative.

The copies of the Revised Draft EIR/Supplemental Draft EIS available at public locations in the project area are being updated to include the corrected Chapter 4.0.

The corrected version of Chapter 4.0 is also available for download from the Authority's website at [www.cahighspeedrail.ca.gov/revised-draft-eir-f-b.aspx](http://www.cahighspeedrail.ca.gov/revised-draft-eir-f-b.aspx).

## Submission for August 2, 2012 CAHSRB Meeting, Sacramento

From: Alan Scott, Founding Member, Citizens for California High Speed Rail Accountability

To: Dan Richard, Chair, California High Speed Rail Board

Date: August 2, 2012

Re: Extension of Fresno to Bakersfield Draft EIR/Draft EIS

**Background:** The authority & the board have continued to exercise poor judgment especially with respect to the Business Plan and EIR's/EIS's regardless of the format issued. You continuously provide massive error ridden documents making it extremely difficult for the average California citizen to provide a proper and a comprehensive review within a restrictive sixty-day period. You further exacerbated the process by issuing corrections; however, making no adjustments to the review period & again this is totally unacceptable.

Once again, CAHSRA & B have created another screwed up flawed document that being the Fresno to Bakersfield Draft EIR/EIS dated July 2012. And with a week of issuance you have already issued a corrective action document without any adjustment to the restrictive review period. Once again, showing total disregard to the California citizen.

Therefore, this letter is submitted requesting immediate action as follows: adjustment of the review period beginning July 26, 2012 through November 26, 2012 with allowances for the Thanksgiving Holiday period, thus the November 26<sup>th</sup> date. Failure to provide this reasonable and justifiable accommodation will only result in appropriate groups taking legal action, which we believe will prevail due to the volumes and volume of documents including all the technical documents, not yet provided. I am sure the courts would look favorability on this reasonable and simple request. If any corrective action items are submitted during this period, then the review period must be extended accordingly.

As further justification for this request, I once again highlight the abject failures of the authority & the board's in these areas: transparency (a total lack of), inadequate & with no timely responses to any and all questions by citizens, by governmental agencies & California legislators over a period of many years. Your outrageous disregard for all of these entities totally unacceptable and unprofessional. Your attitude has fostered a major disrespect form these groups and more importantly the authority staff & the directors as well. Further, Mr. Richard upon your appointment you stated, words to the effect, "I am the new guy on the block and we will right the ship". Well, you did not and during your June meeting in Hanford that became very apparent and clearly demonstrated between you and Mr. Abercrombie where we witnessed a complete total lack of control between the board and the authority.

However, with respect to my (our) request for an extension of the review time, I refer back the September 2011 at Hanford, CA Civil Authorium CAHSRA comment session. This is the session is where the authorities newest PR Director fell asleep during the live comment period, but I digress.

Mrs. Heather Oliveira provided a detailed and factual presentation on one's ability to read a product with over 30,000 pages. Her comprehensive report clearly demonstrated that it could not be done and I believe one person reading the initial document would have taken well over 120-days. That with that in mind and the fact there maybe potential litigation, this information will be submitted for the court to review.

But even more important, as happens in many cases where poor judgment on the part of the elected officials, who are charged with the development of these processes and in this case the CEQA 30-60 day review period they (I am sure) did not envision HSR or similar type massive projects. If one goes back to the time of this enactment one would find that most projects did not have the complexities or volumes of documents, thus this was an acceptable review period. Now fast forward and the courts are always adjusting selected unintentional oversights and this is exactly one of those oversights that I am quite sure the courts will enjoin the state to make the appropriate adjustment(s).

I further challenge you with this, you have 100's of over paid consultants who are known to produce error ridden products and you factor in the massive man hours they expended, I am sure even they could not perform this task individually in the currently allotted time frame? So this proves my case even more.

Mr. Richard, it is extremely clear your group is not happy with the Kings County citizens and you and your predecessor's along with authority staff and contracted consultants fully own this issue because you all created it. The pathetic treatment given to us and so many others in other counties, cities and individuals is disgraceful to say the least. I know this does not bother you but I am making it part of the record, just in case because the numbers we can gather against you far out weight the number on your side, Mr. Richard. I am anticipating a favorable response within 7-business days.

Sincerely,



Alan Scott

1318 Whitmore Street  
Hanford, CA 93230-2848